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90-1586

No. A-710

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1990

RAYMOND DOBARD,

Petitioner, Appellant, Plaintiff

vs.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, et al.,

Respondent, Appellee, Defendant

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE
STATE OF CALIFORNIA
1ST APPELLATE DISTRICT
DIVISION ONE

Raymond Dobard
Petitioner in Pro Per
1866 Alcatraz Ave.
Berkeley, CA 94703
415/658-5344 (Deafness)

April 5, 1991

89

QUESTIONS PRESENTED FOR REVIEW

1. Whether the California State courts can render a legal and proper judgement based on res judicata, collateral estoppel and statute of limitations in a cause of action that involved respondents imposing extrinsic (collateral) fraud or fraudulent misrepresentations on both the court and petitioner? (First raised at CT 366-372)

2. Whether the statute of limitation or res judicata or collateral estoppel is applicable and can be accorded to respondent when respondents intentionally and fraudulently concealed a cause of action? (First raised in lower court authority at

CT 368: 2-12)

3. Whether "just compensation", as referred to by U.S.C.A. Constitutional Amendment 5 includes the payment of interest to owner? (First raised in amended complaint CT50: 17-18)

4. Whether the interest element of "just compensation" for which private property is taken for public use can be deferred dependent upon state statutory provisions in defiance of a constitutional requirement based on U.S.C.A. Constitutional Amendments 5 and 14?

5. Whether respondent's failure to pay "just compensation" for taking petitioner's property for public use

is an organic substitute for the statute of limitation or res judicata? (First raised at CT 367: 4-16)

6. Whether respondents abused discretion by the trover conversion of petitioner's earned interest and the continued taking of petitioner's earned interest for 25 years, being apportioned every six months by Government Code Section 16429 from petitioner's condemnation deposit fund account in light of the legal duty owed by respondents to petitioner mandated by the powers of eminent domain for the payment of "just compensation" which included interest payments? (First raised in Lower Court Second Amended Complaint CT 201: 3-18)

7. Whether the denial of petitioner's use of his property relative to his earned interest is a taking of private property in the constitutional sense without a notice or hearing as required by the 14th Amendment before government can damage or take private property for public use. (Const. Amend. 5, 14 cite: Amen v. City of Dearborn, 718 f2d 789 (1983)) (Raised in AOB at 26:6-13)

8. Whether the conversion and taking of petitioner's earned interest by Government Code Section 16429 can be continually converted to respondent's personal gain, apportioned each and every six months for 25 years after the finality of litigation on May 3, 1966 without a judicial review of

same for "constitutional due process" by a court of law? (First raised in lower courts in M.O.P.A., CT 145: 3-32)

9. Whether the 5th Amendment to the United States Constitution in regard to the interest element of "just compensation" supersedes and takes preference over the State of California statute Government Code Section 16429 that respondents are relying on for taking petitioner's interest? (First raised in lower court authorities at CT 145: 27-29)

10. Whether petitioner's earned interest, which is his <u>personal property</u>, was an "authorized" particular use in the eminent domain action as a public necessity?

(First raised in Lower Court Authorities at CT 272: 25 to 273: 13)

11. Whether respondents had a legal or equitable duty to disclose and pay petitioner both prejudgement and postjudgement interest arising from the relationship of the parties in this eminent domain action of taking petitioner's private property for public use and especially when public records (Exhibit B-2, dated 2/26/76, from State Controller's office) disclose respondents received $583.57 of interest accrued from petitioner's $77,000 probable judgement award from March 16, 1966 to May 17, 1966; Or whether respondents imposed extrinsic fraud on petitioner who was appearing without legal counsel

by intentionally keeping petitioner's judgement award out of petitioner's reach; Or whether this was a fraudulent concealment of a cause of action in the hiding or suppression of a material fact or circumstance surrounding this $583.57 of prejudgement interest received by respondents and not added to petitioner's $79,500 "Judgement in Condemnation" entered on May 3, 1966; (see Exhibit A, Judgement in Condemnation in the attached appendix at pp. A77-A80; and CT 309) (Raised at AOB 22: 2-20) (First raised in lower court declaration of Dobard at CT 382: 23 to 383: 25)

12. Whether respondents had a legal or equitable duty to disclose the

earned interest as element of "just compensation" arising from the relationship of the parties in this eminent domain action of taking petitioner's property for public use, to pay petitioner legal interest from November 25, 1964, the accrual date of compensation based on being the date respondents filed the complaint and as legally required by California statute Code of Civil Procedure section 1263.020. (Raised in appellant's Reply Brief at pp. 5 to 7: 7; and lower court's findings of fact CT 395: 10-12)

13. Whether respondents imposed "extrinsic fraud" upon both the court and petitioner by its falsity as a fraudulent concealment of a cause of action to circumvent payment of petitioner's earned interest ?

14. Whether petitioner was deprived of the manner of payment of compensation and investments of deposit of which the owner is entitled as the result of acquisition, which includes interest? (Request judicial notice to California Code of Civil Procedure sections 1263.015 and 1255.075).

15. Whether respondents' failure to pay petitioners his earned post-judgment interest (that accrued between the 4 1/3 month period after the judgment in condemnation date from May 3, 1966 to September 15, 1966) is recognized as extrinsic fraud being imposed upon both the court and petitioner? (First raised amended complaint, CT 131:8-16).

16. Whether respondent's acts and course of conduct was in direct violation of California's Code of Civil Procedure section 1268.310(a)? (that requires the compensation awarded in the proceeding to draw interest from (a) the date of entry of judgment) (Raised

amended complaint, CT 132:28-31).

17. Whether the interest element of "just compensation" for private property taken for public use as to which payment is deferred and constitutionally required can be made dependent upon state provisions? (First raised in M.O.P.A. CT 145:27-29);

18. Whether petitioner's private property taken for public use is constitutionally entitled under the Fifth Amendment of the United States Constitution to be put in as good a position preconiarily as he would have been if his property had not been taken by respondents? (Raised ARB 13:27-28).

19. Whether the imposition of "extrinsic fraud" deprived petitioner of a "full and fair hearing" regarding the interest element of just compensation. (Raised appellant's petition for rehearing 2: to 3:1-20).

20. Whether the statute of limitation

is applicable due to respondent's ongoing and continual conversation of petitioner's earned interest currently being apportioned every six months as a circumstance of continuing nature and character.

21. Whether the accrued interest from May 3, 1966 to September 15, 1966 ripened into petitioner's vested right on his equitable judgment award, an available demand, or an existing cause of action arising by way of increase or argumentation. (Globe Indemnity v. Bruce 81 F.2d 143, 153) (First raised at CT 369:4-20).

22. Whether respondents by willful or malicious motive failed to condemn and appraise petitioner's air-rights over his property as a taking of private property for public use without payment of "just compensation"; Or whether respondents engaged in extrinsic fraud with the City of Berkeley on October 20, 1964, disguised as an option scheme, to sell to the City of

Berkeley the air rights over Petitioner's property, at the Ashby station prior to respondent's exercising condemnation of petitioner's property on November 25, 1964; Or whether the agreement to sell the air rights over petitioner's property at the Ashby station by respondents for a sum certain, as the seller, to the City of Berkeley, as the buyer established the market value of the air-rights? (first raised in amended complaint at CT 50:19-31).

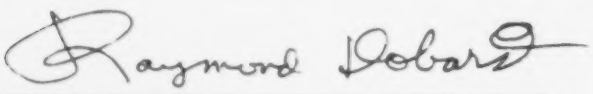
23. The constitutional question is whether petitioner is the exclusive legal owner of all rights attached to his property including the air-rights over his property? (First raised in amended complaint CT 50:23-29; and at CT 136:22 to 138:25).

LIST OF PARTIES

1. San Francisco Bay Area Rapid Transit District
2. Keith Bernard
3. Michael Sharpe
4. Ernest Howard
5. Gray Davis

Dated: April 5, 1991

Respectfully submitted



Raymond Dobard
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OPINIONS
DATES OF JUDGMENTS OR
DECREES SOUGHT TO BE REVIEWED

- Finding of Fact and Conclusion of Law, Superior Court of California, County of Alameda, Action No. 345,957, Received March 31, 1966 and Filed April 15, 1966 (Exhibit D in appendix, pp. A 91)

- Judgment in Condemnation, Superior Court of California, County of Alameda, Action No. 345,957, Filed on May 3, 1966 (Exhibit A in Appendix pp. A77)

- Final Order of Condemnation, Superior Court of California, County of Alameda, Action 345,957, Filed May 3, 1966 (Exhibit B at ct 89:)(pp. A 74)

- Order for release of deposit, Superior Court of California, County of Alameda, Action No. 345,957 filed May 3, 1966 (Exhibit B-1 in Appendix pp. A72)

- Order for Withdrawal of Judgment Award and for deposit in State Treasury, Superior Court of California, County of Alameda, Action No. 345,957, filed September 2, 1966. (Exhibit C in Appendix pp. A69)

- Statement of Decision, Superior Court of California, County of Alameda, Action No. 642,762-5, filed February 16, 1989. (Exhibit E, in Appendix pp. A 52)

- Order affirming Judgment, in the Court of Appeal of the State of California First Appellate District Division One, Case No. A045,389, filed September 28, 1990. (Exhibit 3(b) in Appendix pp. A34)

- Petition for Rehearing denied, Court of Appeal of the State of California, First Appellate District, Division One, Case No. A045,389, filed October 26, 1990. BB. A 33 OF APPENDIX

- Petition for review is denied, Supreme Court of the State of California, No. S018129, filed December 12, 1990.

APPENDIX A 32

JURISDICTION

THis application for Writ of Certiorari is taken pursuant to 28 U.S.C. 1257(a), which authorizes cases to be reviewed when a State court has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

i) Petitioner seeks review of the Statement of Decision of the Superior Court of California, County of Alameda in civil action No. 642, 762-5, filed February 16, 1989. (In appendix at pp.)

ii) Order affirming judgment, in the Court of Appeal of the State of California filed September 28, 1990. (In Appendix at pp.)

iii) Petition for rehearing denied by Court of Appeal of State of California on October 26, 1990.

iv) Application for an extension of time to file a petition for a writ of certiorari was granted by the Supreme Court of the United States on Mnarch 21, 1991, extending time to April 11, 1991 . . . Application No. A-710.

v) The constitutional provisions, statutes and regulations involved in this case is centered around the 5th and 14th Amendments to the United States Constitution relative to "just compensation" for the taking of private property for public use.

STATEMENT OF THE CASE

Petitioner, Raymond Dobard, is plaintiff, appellant, a black american, and the aggrieved party who has been appearing in this entire eminent domain case in pro persona and as a handicapped person with hearing-impaired deafness and has been deprived of a fair trial by extrinsic (collateral) fraud and fraudulent concealment of a cause of action by respondents. (First raised in lower court in authorities and motion for reconsideration at CT 366-372)

Petitioner's lawsuit was being brought to recover possession of property taken unlawfully from petitioner by respondents through "extrinsic fraud" that prevented petitioner from knowing about his rights when his property was taken by respondents 25 years ago, due to

petitioner's appearance without the benefit of legal counsel. Respondents by fraud, deceit, fraudulent concealment and suppression of material evidence relative to "just compensation" prevented petitioner from knowing about his rights or defenses or having a fair opportunity of presenting them at the first trial in the Superior Court of California County of Alameda in eminent domain civil action No. 345,957, with condemnation judgement rendered May 3, 1966. (First raised in lower court in authorities and motion for reconsideration at CT 366-372, and motion denied by court)

The instant appeal and request of writ of certiorari involves a property damage complaint filed in the Superior Court of California County of Alameda in civil action No. 642762-5, filed on September

12, 1988 to recover possession of petitioner's property and his earned interest unlawfully taken in civil action No. 345,957, whereas respondents have been converting petitioner's earned interest on his exclusive condemnation deposit fund account in the California State Treasury continuously for the past 25 years. Respondents have used the "feeble excuse" for converting petitioner's earned interest to its personal gain unjustifiably claiming that petitioner's earned interest was committed to respondents under the order of the court pursuant to government code section 16429(c). Petitioner informs this Honorable United States Supreme Court that petitioner's earned interest as a "constitutional claim", which is derived from his Condemnation Judgement Award as an element of "just compensation" for which private property

is taken for public use cannot be deferred dependent upon State statutory provisions in defiance of a constitutional requirement based on U.S.C.A. Constitutional Amendments 5 and 14. (First raised in plaintiff (petitioner) authorities in opposition to defendant's demurrer at CT 145: 27-29 and the court sustained defendant (respondent's) demurrer.)

The statute of limitation or res judicata is not an organic substitute for respondent's failure to pay "just compensation" prior to the taking, or damaging, petitioner's property for a public use. Petitioner informs this Honorable Supreme Court that his current lawsuit that stems from his prior lawsuit to recover possession of property taken unlawfully in the prior action No.

345,957, on his constitutional claim to recover his earned interest calls for a delicate adjustment between the lower court's desirability of finality and prevention of injustice. In re. Casco Chemical Co. C.A. Tex. 1964, 335 f2d 645. (Raised in appellant's (petitioner) petition for rehearing at page -1(a)-, 2-23). Moreover, finality is, and should be, strong, but in the face of unusual factors, equitable principles encompassed within F.R.C.P. 60(b) and California Civil Code section 1573 justify further inquiry into fraud or deception upon the court and petitioner relative to respondent's intentional nondisclosure or suppression of evidence by fraudulent concealment of vital and essential issues pertaining to petitioner's earned interest from November 25, 1964 and petitioner's air rights' market value,

both issues are construed to be a denial of just compensation by respondents for taking private property for public use that respondents had a legal duty to disclose based on the eminent domain relationship and laws. California Code of Civil Procedure section 1263.020 requires respondents to pay interest from November 25, 1964, the accrual date of compensation. (CT 395: 10-12 and ARB: 5-7)

The mere fact that through operation of res judicata judgement has been entered herein does not alter availability of equitable relief if parties are available and controlling equitable principles are satisfied by facts relative to "just compensation". (Raised in petition for rehearing -2(a)-: 2-6 that of which was denied by appellate court)

Respondents have trover converted an excess of $207,405.38 of petitioner's earned interest from his condemnation fund account with the State Treasury over the past 25 years as an unjust enrichment and personal gain, and especially after ~~taking~~ and having complete possession, use and enjoyment of petitioner's private property for the past 25 years as a result of Judgement in Condemnation on May 3, 1966. (First raised in lower court in Second Amended Complaint at CT 201: 3-18 and the court sustained respondent's demurrer without leave to amend. Also see computation of interest earned in condemnation deposit fund Case No. 345959 compiled by Certified Public Account Merchants Bookkeeping and Tax Service reflecting $207,405.38) (Clerk's Transcript pp. 95-100 raised in lower court on 11-4-88 in support of motion for

new trial which was denied). As of this date respondents have converted an excess of $300,000 to its personal gain.

Respondents have converted an excess of $300,000 of petitioner's earned interest (compounded) in violation of constitutional due process laws and the 14th Amendment which provide for notice and hearing prior to taking or damaging private property for public use. First raised in lower court in Authorities at CT 145: 10-14 and the court sustained defendant's (respondent's) demurrer.

By further acts of extrinsic (collateral) fraud or fraudulent concealment, respondents received $583.57 as petitioner's prejudgement interest on deposit with the State Treasury as concealment of a cause of action. See EXHIBIT B-2, LETTER, 2/26/76 IN APPENDIX AT A64-A66.

CONSTITUTION

Both California Constitution, Article I, section 19 and the United States Constitution, Amendment 5, clearly provide that private property cannot be taken, or damaged, for public use without "just compensation" having first been made to, or paid into court for, the owner.

EXTRINSIC (collateral) FRAUD

(i) On November 25, 1964, respondents filed summons and complaint in the Superior Court of California County of Alameda to condemn petitioner's real property described in the complaint as parcel O-R507. See Exhibit D, Finding of Facts and Conclusion of Law at CT 395: 10-12; and in appendix at pp. _____ for establishing the date of November 25, 1964 as date respondents condemned petitioner's property. On page CT 396: 14-17 of said findings Exhibit D, the court set forth the fair market value of petitioner's property as of the date of

November 25, 1964 to be $79,500. California Code of Civil Procedure section 1263.020 provides that the right to compensation shall be deemed to have accrued at the date of filing the complaint. Raised in appellant's opening brief at 24: 2-8, filed October 30, 1989 and not given consideration in petitioner's petition for rehearing that was denied on October 26, 1990. (First raised in lower court in petitioner's motion for reconsideration filed 2/22/89, CT 382: 23 to CT 384: 13) (Exhibit D in appendix at pp. _____)

(ii) Respondents had a legal duty arising out of the relationship of laws of eminent domain to pay petitioner the $583.57 of prejudgement interest that it received by Exhibit B-2, the letter of California State Controller dated 2/26/76 disclosing that the State Treasury paid respondents $583.57 of accrued interest derived from petitioner's funds on deposit with the State Treasury. (See Exhibit B-2 at page _____ in its appendix and raised at appellant's opening brief 22: 2-20; being first raised in declaration of Dobard, filed 2-22-89, CT 383: 25-29 attesting that California

Code of Civil Procedure section 685.010 clearly states where a public agency condemns property and exercises its statutory right to take possession, "just compensation" includes interest at prevailing market rate rather than legal rate.

(iii) Respondent's failure to pay petitioner his earned postjudgement interest (that accrued between the 4 1/3 month period after judgement in condemnation date of May 3, 1966 to September 15, 1966 is clearly recognized as extrinsic fraud or fraudulent concealment of a cause of action. (See letter from Gray Davis, Controller of State of California dated February 24, 1988, as Exhibit 4-(1), in appendix at pp. _____, reflecting computation of interest of petitioner's condemnation deposit fund account in an amount of $60,058.27 paid to respondents as earned interest from petitioner's judgement award funds between the period of 9-15-66 to 11-30-81. California Code of Civil Procedure section 1268.310(a) requires the compensation awarded in the proceeding to draw interest from (a) the date of entry of judgement. (First raised in the lower court by amended complaint filed November 22,

1988 that was demurred without leave to amend; also reflected in CT 132: 28-30)

(iv) Respondents, by willful or malicious motive, failed to appraise petitioner's air rights over his property as a taking of private property for public use without payment of "just compensation" by extrinsic collateral fraud or fraudulent concealment of a fact that respondents had a legal duty to disclose, entered a fraudulent ploy with the City of Berkeley on October 20, 1964 to purchase the air rights over petitioner's property and without appraising same for the benefit of petitioner as a fair market value. On November 25, 1964, respondents condemned petitioner's property without paying just compensation or appraising petitioner's air rights for his benefit. Respondents and the City of Berkeley created the market value in the dollar amount over petitioner's property and the failure to pay petitioner just compensation is an abuse of discretion and fraud.

(v) California Code of Civil Procedure section 1240.020 requires resolution of necessity from respondent

governing board prior to taking petitioner's earned interest which was not "an authorized" particular use in the eminent domain action as a public necessity. (First raised in lower court in Authorities in opposition to demurrer at CT 272-273)

For all the foregoing reasons, this Honorable United States Supreme Court should grant petitioner a Writ of Certiorari for reviewing the lower state court's decisions on important questions of federal law which have not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

April 5, 1991

Respectfully Submitted,

Raymond Dobard

Raymond Dobard, petitioner

-30-

UNITED STATES SUPREME COURT

October 1990 Term

APPENDIX... OF EXHIBITS

SUPREME COURT
FILED
Dec. 12 1990
Robert Wandruff Clerk
Deputy

O R D E R D E N Y I N G R E V I E W

AFTER JUDGEMENT BY THE COURT OF APPEAL

First Appellate District, Division One,
No. A045389
S018129
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

I N B A N K

RAYMOND DOBARD, Appellant

v.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
Et Al., Respondents

Appellant' petition for review DENIED.
The request for an order directing
publication of the opinion is denied.

LUCAS
Chief Justice

EXHIBIT 4 -A 32-

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION ONE

File Date October 26, 1990

RAYMOND DOBARD,	)	No. A045389
Plaintiff and Appellant,	)	Alameda Co.
	)	Superior
vs.	)	Court
	)	642762-5
SAN FRANCISCO BAY AREA RAPID,	)	
TRANSIT DISTRICT, et al.,	)	
Defendants and Respondents.	)	

By The Court

The motion to recuse Justices Racanelli, Newsom and Stein is denied. The application for an injunction restraining Justices Racanelli, Newsom and Stein from deciding the petition fro rehearing is denied. The motion to delay decision on the petition for rehearing is denied.

The petition for rehearing is denied.

Dated _____ _____

FILED
Sep. 28, 1990
Court of Appeal - First App. Dist
RON D. BARROW
Deputy

**NOT TO BE PUBLISHED
IN OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RAYMOND DOBARD,

Plaintiff and Appellant,

v.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT et al.,

Defendants and Respondents.

A045389

(Alameda County
Super. Ct. No. 642762-5)

Raymond Dobard, appearing in propria persona, appeals from an order sustaining a demurrer to his second amended complaint against San Francisco Bay Area Rapid Transit District (BART), Keith Bernard, Michael

EXHIBIT 3(B) -A34-

Sharpe, Ernest Howard, and Gray Davis.[1] We will affirm the judgement.

FACTS

Approximately 20 years ago, BART initiated eminent domain proceedings against certain real property owned by Dobard.[2] On May 3rd,

1. An order sustaining a demurrer without leave to amend is not an appealable order. (Mounger v. Gates (1987) 193 Cal.App.3d 1248, 1254.) The superior court did, however, subsequently file a statement of decision in which it clearly stated the multiple reasons why Dobard could not state a cause of action. Although the statement of decision does not technically qualify as a judgement, it is obvious that the court intended by its order to enter judgement dismissing all causes of action. Thus to avoid any further delay, this court exercises its power to amend the order to include a judgement of dismissal of the second amended complaint. (Randle v. City and County of San Francisco (1986) 186 Cal.App.3d 449, 453-454.)

2. These facts are derived from Dobard's pleadings and the voluminous exhibits thereto, and from court records judicially noticed by the court below. Although a demurrer normally is limited to the face of the pleading, the court may also consider any matter judicially noticed. (Code Civ. Proc., § 430.30, subd. (a); Dryden v. Tri-Valley Growers (1977) 65 Cal.App.3d 990, 997.) The court may also read the complaint as if it included facts set forth in exhibits to the complaint.

1966, a judgement in condemnation and a final order of condemnation were entered. The judgement in condemnation provided that upon BART's payment into court of the amount of $79,500, BART would become the owner of the real property described in the judgement. The payment of $79,500 was for the benefit of Raymond Dobard, his wife Jeanne Dobard, Adah Taylor, Allyne Graff Bacher, Georges Courtois, Roger Courtois and the County of Alameda. The judgement in condemnation further provided that the sum of $15,873.23, the amount of a lien granted to Adah Taylor in a separate action against Dobard and his wife, should be held in the custody of the count until the final disposition of the appeal in that separate matter. Any amount remaining after the payment of amounts owed

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(4 Witkin, Cal. Procedure (3d ed. 1985) § 385, pp. 433-434.) Moreover, if the allegations of the complaint conflict with recitals set forth in exhibits to the complaint, the exhibit will control. (Id., citing Alphonzo E. Bell Corp. v. Bell etc. Synd. (1941) 46 Cal.App.2d 684, 691.)

on a promissory note and taxes was to be paid to Dobard and his wife. The final order of condemnation stated that BART, having paid the amount of $79,500 into court, was the owner in fee simple absolute of the property. On September 2, 1966, the court entered an order for withdrawal of the judgement award and for deposit in the state treasury. The judgement award was thereupon deposited in the state treasury.

Dobard did not withdraw the principal for many years. The entire principal remained on deposit until October 1970. Thereafter principal was withdrawn at intervals, leaving the principal amount of $2,036.52 as of November 1981. The total interest accrued from the date of the initial deposit was $60,058.27, and as of 1988 that amount had ben paid to BART pursuant to Government Code section 16429.

On September 12, 1988, Dobard filed a complaint against BART. After the court

sustained two demurrers with leave to amend, Dobard filed a second amended complaint. The underlying wrongs alleged in the second amended complaint were substantially similar to the original complaint. With respect to each cause of action, Dobard alleged that BART had condemned his real property unnecessarily, without a valid public purpose, and in retaliation against him for having filed a taxpayer's suit against BART; that BART failed to compensate him for the air rights to his property and then sold the air rights to the City of Berkeley; and that BART had misled Dobard into believing that the interest earned on the deposit was payable to him and converted the interest earned on the condemnation deposit to its own use. These basic factual allegations were then incorporated into the following causes of action: Continuing conspiracy to interfere with civil rights, fraudulently taking air rights without compensation,

breach of fiduciary duty, intentional infliction of emotional distress, breach of public policy, and denial of due process.

The court sustained the demurrer to the second amended complaint without leave to amend. At Dobard's request the court, on February 16, 1989, filed a detailed statement of decision explaining that each of the causes of action alleged in the second amended complaint failed to state a cause of action for one or a combination of the following reasons: (1) Pursuant to Government Code section 16429, BART was entitled to the interest earned on the condemnation deposit; (2) any attack on the propriety of the condemnation proceedings was barred by res judicata; and (3) Dobard's causes of action were barred by the statute of limitations. Dobard filed a motion for reconsideration on February 21, 1989 and the court denied that mption on April 6th, 1989. Dobard filed his notice of appeal on March

10, 1989.

ANALYSIS

It would be impossible to respond to each of the arguments in appellant's brief without substantially confusing the issues on appeal. We therefore confine our analysis to the allegations of the second amended complaint and whether the court correctly sustained the demurrer to each cause of action. Each cause of action was based on the same underlying allegations that (1) BART converted interest earned on the condemnation award that should have been invested for Dobard's benefit; (2) BART fraudulently took appellant's air rights without just compensation and thereafter sold them to the City of Berkeley, unnecessarily condemned his property for no public purpose, and condemned appellant's property to retaliate against appellant for filing a taxpayer's suit against BART. As we shall explain below, to the extent that each cause of action was based on the allegation that

BART converted the interest on the judgement deposited in the state treasury, the demurrer as to each cause of action was properly sustained because BART was entitled to the interest on the judgement award. Moreover, to the extent that any cause of action was based on a challenge to the condemnation proceedings, that cause of action is barred by res judicata.

1. BART Was Legally Entitled to Accept Payments of Interest on the Deposit

As the trial court explained, "under Code of Civil Procedure section 1268.320(b)[3] and its predecessor, former section 1255b(c)[4],

3. Section 1268.320 provides in pertinent part: "The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates; . . . (b) As to the amount deposited in accordance with Article 2 . . . the date of such deposit."

4. Former section 1255b, subdivision (c), which was in effect at the time judgement was entered in 1966 in this case, provided in relevant part: "The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates: . . .

interest ceased to accrue on the date the judgement funds, including interest accrued to that date, were deposited by BART in court, i.e., on May 3, 1966. Therefore, [Dobard] has not been entitled to any interest on the judgement at any time since BART deposited the funds in court."

Moreover, pursuant to Government Code section 16429, subdivision (c), the interest on any deposit in the Condemnation Deposits Fund is payable to the "plaintiff," i.e., the condemnor.[5] Thus, as a matter of law, BART was acting in accordance with the law when it accepted payments of the interest on the

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(4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgement, the date of such payment." (Stats. 1961, ch. 1614, § 10, p. 3451.)

5. Government Code section 16429, subdivision (c) is a reenactment of former Code of Civil Procedure section 1254, subdivision (i), which was in effect at the time BART deposited the funds in 1966. (Law Rev. Comm. com. to Gov. Code, § 16429.)

deposit.

Appellant's mistaken belief that he was wrongfully deprived of interest on the award is base on an apparent misunderstanding of the law and facts. He attaches great importance to a letter he received in 1976 in which a BART official responded to his request for an accounting of interest. The letter explained that, as Dobard apparently was aware, the funds were available for withdrawal at any time. The last paragraph, in response to Dobard's demand for the interest, stated that if Dobard obtained a court order requiring that BART pay to Dobard the interest it had been paid, BART would comply. Dobard interprets this letter as an attempt to mislead him into believing that BART would pay the interest to him, and to conceal from him the fact that BART was entitled to the interest so long as the deposit remained in state treasury. The letter, however, is not reasonably

susceptible of such a construction. It does no more than state

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the obvious fact that if Dobard could persuade a judge that he was entitled to the interest, BART would comply with the court's order. The court was entitled to rely on the document attached as an exhibit to the complaint, rather than the general allegations of fraud. (4 Witkin, Cal. Procedure, supra, §385, pp. 433-434; citing Alphonzo E. Bell Corp. v. Bell etc. Synd., supra, 46 Cal.App.2d 684.)

Dobard also contends that BART failed to comply with the procedures applicable to eminent domain in "taking" the interest. Assuming arguendo that these procedures apply to the taking of personal property, BART was entitled to the interest and thus no "taking" occurred.

Dobard further argues that Code of Civil Procedure section 1268.150, subdivision (b), required that BART "deposit and invest appellant's judgment award . . . for the benefit of appellant." Section 1268.150, however, applies only if "after entry of judgment but prior to apportionment of the award the defendants are unable to agree as to

the withdrawal of all or a portion of any amount deposited," and one of the defendants files a motion requesting investment of the funds for the benefit of the defendants pending resolution of the dispute. (Code Civ. Proc., § 1268.150, subd. (b).) Dobard does not allege either that a dispute over apportionment occurred or that he, or any other defendant in the eminent domain proceeding, filed such a motion. Thus, section 1268.150 is clearly inapplicable.

We therefore conclude that to the extent each cause of action was based on allegations that BART had converted or wrongfully deprived appellant of interest on the condemnation deposit, the court properly sustained the demurrer because BART, as a matter of law, was entitled to the interest earned.

2. Any Attack on the Prior Judgment in Condemnation Was Barred By Res Judicata

The remaining allegations of the complaint, incorporated into each cause of action, were that BART condemned his "air

rights" without appraising them or providing just compensation, sold them to the City of Berkeley without his permission, condemned his property without a public purpose, and condemned his property in retaliation for his having filed a taxpayer's lawsuit against BART. These allegations amount to an attack on the 1966 judgment in condemnation and are barred by the doctrine of res judicata.

It is elementary that "'[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration . . . ." (7 Witkin, Cal. Procedure (3d ed 1985) Judgment §188, p. 621; italics in original.)

'The doctrine of res judicata is a part of the common law of this state (Slater v. Blackwood (1975) 15 Cal.3d 791 [126 Cal.Rptr. 225, 543 P.2d 593]) and also is reflected in such statutes as Code of Civil Procedure

section 1908.

"Restatement Second Judgments views the doctrine as a bar or merger applicable to subsequent litigation between the same parties concerning the same controversy with very few exceptions. The Restatement's approach is based on the assumption that there has been an opportunity in the first litigation for a fair and full hearing of the claim asserted. Once that opportunity has been afforded, the Restatement Second asserts, fairness dictates that the controversy in question be put to rest." (Nakash v. Superior Court (1987) 196 Cal.App.3d 59, 67-68.)

All of the claims we have described with respect to condemnation of air rights, condemnation without a proper public purpose, and condemnation for retaliation, could have been raised as objections to the right of BART to take appellant's property. (Code Civ. Proc., §§ 1250.360, 1250.370.) Thus, they clearly involve the "same controversy." The trial court correctly concluded that: "The Judgment in Condemnation and Final order of Condemnation

gave BART ownership of the entire fee including the air rights. (Civ. Code, § 829.) Furthermore, the judgment was a final determination of BART's right to condemn the property and the amount of just compensation for the fee simple absolute including the air rights."

Appellant argues that, somehow, the allegation that BART concealed its plan to sell the air rights preserves this claim. despite the fact that, in substance, it is nothing more than an attempt to collaterally attack the finality of the 1966 judgment. Even if BART did "conceal" its plan to sell the air rights to the City of Berkeley, this fact would not state a cause of action. BART as the condemnor had no duty to explain to Dobard, an adverse party, that the condemnation included the air rights. Nor did BART have any duty to disclose any plans it may have had to sell those rights. Pursuant to Code of Civil Procedure section 1240.120, subdivision (b), condemnors may acquire property "with the intent to sell, lease, exchange, or otherwise dispose of the

property, or an interest therein . . . ." Thus, even if we accept as true Dobard's allegation that BART did not disclose its plan to sell the air rights to the City of Berkeley during the eminent domain proceedings, that fact fails to state a cause of action.

We therefore conclude that to the extent that each cause of action was based on allegations that BART failed to compensate Dobard for the air rights; or that it condemned his property unnecessarily and without a public purpose, and in retaliation for filing a taxpayer's lawsuit; the demurrer was correctly sustained on the ground that the cause of action was barred by res judicata.

CONCLUSION

The judgment is affirmed.

_____
Stein, J.

WE CONCUR:

_____
Racanelli, P.J.

_____
Newsom, J.

JOHN D. ROGERS
A PROFESSIONAL CORPORATION
220 Bush St., Suite 120
San Francisco, CA 94104
(415) 981-2470

ALICE M. BEASLEY
LEIGH-ANN K. MIYASATO
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12 Geary Street, 8th Floor
San Francisco, CA 94108
(415) 781-3040

Attorneys for Defendants
San Francisco Bay Area
Rapid Transit District,
Keith Bernard, Ernest Howard
and Michael Sharpe

ENDORSED
F I L E D
Feb 16 1989
Rene C.Davidson
County Clerk
By Elaine Garcia
Deputy

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ALAMEDA

RAYMOND DOBARD Plaintiff vs. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, ET AL., Defendants.	No. 642762-5 STATEMENT OF DECISION Date: 1/17,89 Time: 2 p.m. Dept: 19 (Law & Motion)

EXHIBIT E

The demurrer of defendants San Francisco Bay Area Rapid Transit District, with Keith Bernard, Ernest Howard and Michael Sharpe to the Second Amended Complaint of plaintiff Raymond Dobard herein came on regularly for hearing on Jaunary 18, 1989, in Department 19 ob the above-entitled court, the Honorable Dawn B. Girard presiding. Raymond Dobard, plaintiff, appeared in propria persona and Alice M. Beasley appeared as counsel for defendants.

After hearing, the matter was submitted to the court for a ruling. The court, having read the supporting and opposing points and authorities and having heard the arguments of counsel and being fully advised, issues the following statement of decision:

Over twenty-two years ago, defendant San Francisco Bay Area Rapid Transit District (BART) took certain real property of plaintiff's by an action in eminent domain. In that

action, this court entered a Judgment in Condemnation and a Final Order of Condemnation on May 3, 1966. The court takes judicial notice of the judgment and order. They provided that BART, having paid into court the sum of $79,500, which included interest to that date, was entitled to the property in fee simple absolute.

On September 2, 1966, this court entered an Order for Withdrawal of the Judgment Award and for Deposit in the State Treasury. The court takes judicial notice of such order. The order specified that the judgment awarded be withdrawn from the court and deposited in the Condemnation Deposits Fund of the State Treasury. Interest on the amounts remaining on deposit throughout the years was paid to BART by the State Treasurer pursuant to Government Code section 16429(c).

1. With regard to plaintiff's First Cause of Action, the court's decision

is that plaintiff cannot state a cause of action for conspiracy to interfere with his civil rights. The gravamen of plaintiff's complaint is that the interest on the funds deposited in the State Treasury after judgment belongs to him. However, under Code of Civil Procedure section 1268.320(b) and its predecessor, former section 1255b(c), interest ceased to accrue on the date the judgment funds, including interest accrued to that date, were deposited by BART in court, i.e., on May 3, 1966. Therefore, plaintiff has not been entitled to any interest on the judgment award at any time since BART deposited the funds in court.

The First Cause of Action is also based on the allegation that BART fraudulently condemned plaintiff's "air rights," and unnecessarily and maliciously condemned his business in retaliation for his having filed a taxpayer lawsuit against BART. This allegation is barred

by the doctrine of res judicata. The Judgment in Condemnation and Final Order of Condemnation gave BART ownership of the entire fee including the air rights. (Civ. Code §829.) Furthermore, the judgment was a final determination of BART's right to condemn the property and the amount of just compensation for the fee simple absolute including the air rights. Thus, the 1966 judgment is conclusive on the allegations set forth by plaintiff in this cause of action.

Plaintiff's allegations that BART "fraudulently" took his "air rights" and "unnecessarily" condemned his business are further barred by the statute of limitations. The applicable statute of limitations is either three years or five years. (Mehl v. People ex rel. Dept. Pub. Wks. (1975) 13 Cal.3d 710, 717.) Thus, regardless of which statute of limitations applies, plaintiff's allegations are barred. Plaintiff cites Code of Civil Procedure section 348 for the

proposition that no statute of limitations applies to his claims. Section 348 applies only to claims for money or other property deposited with banks or similar institutions, not to the State Treasury. Further, plaintiff apparently has withdrawn nearly the entire amount of the 1966 deposit. (Second Amended Complaint, Exhibit 4.)

Defendants' demurrer to the First Cause of Action for fraudulently taking plaintiff's air rights, the court's decision is that this cause of action is barred because it was not stated in the claim presented by plaintiff to BART. (Shelton v. Superior Court (1976) 56 Cal. App.3d 66, 82.) That claim, attached to the Second Amended Complaint, alleged only that plaintiff is entitled the interest on funds deposited with the state; it mentioned nothing about "air rights." Defendants' demurrer to the Second Cause of Action is sustained without leave to amend.

3. With regard to plaintiff's Third Cause of Action, the court's decision is that plaintiff cannot state a cause of action for breach of fiduciary duty. As stated above, plaintiff was not entitled to the interest and therefore BART could not have breached any fiduciary duty to plaintiff. Further, the cause of action is barred by the doctrine of res judicata and by the statute of limitations, Code of Civil Procedure section 343. Defendants' demurrer to the Third Cause of Action is sustained without leave to amend.

4. With regard to plaintiff's Fourth Cause of Action, the court's decision is that plaintiff cannot allege facts sufficient to state a cause of action for intentional infliction of emotional distress. The face of the Second Amended Complaint shows that BART's actions were proper under the statutes cited above. Further, under the doctrine of res judicata and the statute of

limitations, BART's actions with respect to the condemnation of plaintiff's property twenty-two years ago cannot be challenged at this late date. Defendants' demurrer to the Fourth Cause of Action is sustained without leave to amend.

5. With regard to plaintiff's Fifth Cause of Action for breach of public policy, the court's decision is that this cause of action is barred by the doctrine of res judicata and the statute of limitations, as set forth above. No such cause of action is recognized under California law, and the allegations are no different than those made in plaintiff's other four causes of action. Defendants' demurrer to the Fifth Cause of Action is sustained without leave to amend.

6. With regard to plaintiff's Sixth Cause of Action for denial of due process, the court's decision is that this cause of action is barred by the doctrine of res judicata and the statute of limitations,

as set forth above. Plaintiff knew or should have known that the air rights were included in the valuation of his fee, since Civil Code section 829 has long provided that a fee interest includes the surface of land and everything below and above it. The valuation issue was settled by the Judgment in Condemnation entered on May 3, 1966. Defendants' demurrer to the Sixth Cause of Action is sustained without leave to amend.

Dated: 2/15/89

Dawn B. Girard

The Honorable Dawn B. Girard
Judge of the Superior Court

Frank H. Smith
Certified Public Accountant
1840 Alcatraz Avenue
Berkeley, California 94703

MERCHANTS
BOOKKEEPING & TAX SERVICE

I SUBMIT HEREWITH THE COMPUTATION OF INTEREST EARNED STATEMENT. MY PROFESSIONAL SERVICES IN CONNECTION WITH THIS REPORT WERE TO COMPUTE COMPOUND INTEREST FROM THE INFORMATION SUPPLIED TO ME BY RAYMOND L. DOBBARD.

THE COMPUTATION OF INTEREST EARNED STATEMENT IS LIMITED TO PRESENTING THE INFORMATION THAT IS THE REPRESENTATION OF THE ABOVE NAMED INDIVIDUAL. A COMPUTATION DOES NOT REQUIRE INQUIRES OR OTHER PROCEDURES TO VERIFY, CORROBORATE OR REVIEW THE INFORMATION SUPPLIED. I HAVE NOT VERIFIED THE INFORMATION SUPPLIED, AND ACCORDINGLY DO EXPRESS AN OPINION OR ANY OTHER FORM OF ASSURANCE ABOUT THE STATEMENT. HOWEVER, THE COMPUTATION OF INTEREST EARNED SCHEDULE APPEAR TO BE APPROPRIATE IN FORM, FREE

EXHIBIT 5

FROM OBVIOUS MATERIAL ERRORS, INCLUDING ARITHMETICAL OR CLERICAL MISTAKES, AND IN THE APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES.

Alfred Kemp
Certified Public Accountant

DATE: 9-27-88

COMPUTATION OF INTEREST EARNED
IN CONDEMNATION DEPOSIT FUND
CASE NO. 345959
SAN FRANCISCO BAY AREA AREA
RAPID TRANSIT DISTRICT

VS.

RAYMOND L. DOBARD, et al.

DURING THE PERIOD FROM SEPTEMBER 15, 1966 TO JUNE 30, 1988 INTEREST EARNED ON CONDEMNATION DEPOSIT FUND AMOUNT TO $207,405.38

GRAY DAVIS
Controller of the State of California
Sacramento, California 94250
(916) 324-3796
February 24, 1988

Mr. Ray Dobard
1866 Alcatraz Avenue
Berkeley, CA 94703

Dear Mr. Dobard:

In response to your letter dated February 12, 1988, we are forwarding a computation of the amount of interest earned on the deposit in the Condemnation Deposits Fund by the Bay Area Rapid Transit District for Case No. 345957 for the period January 1, 1976 to December 31, 1987.

The amount of interest earned for these periods have been paid to the Bay Area Rapid Transit District pursuant to Section 16429 of the Government Code of the State of California

Please refer to the attached schedule and the copies of previous correspondence concerning the interest for the time period requested.

 EXHIBIT 4-(1)

If you have any questions, please call Carleen Wessler at (916) 324-3796.

Sincerely,

Roger A Resnikoff, Chief
Division of Accounting

CMW:hj
Encls.

Computation of interest earned
In Condemnation Deposit Fund
On Deposit of Case #345959
San Francisco Bay Area
Rapid Transit District
Vs. Raymond L. Dobard, et al.

Period of Interest			Interest Earned
9/15/66	-	12/31/66	$ 1,176.16
1/1/67	-	6/30/67	1,979,45
7/1/67	-	12/31/67	1,999.03
1/1/68	-	6/30/68	2,167.18
/			
/			
/			
/			
/			
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/			
1/1/79	-	6/30/79	2,586.15
7/1/79	-	12/31/79	2,586.27
1/1/80	-	6/30/80	2,903.17
7/1/80	-	12/31/80	1,573.43
1/1/81	-	6/30/81	995.27
7/1/81	-	11/30/81	91.50
			$ 60,058.27

HC:jf

cc:H.Costanzo
S. Millar
enc.

EXHIBIT 4

KENNETH CORY
CONTROLLER OF THE STATE OF CALIFORNIA
Sacramento, California 95805
(916) 445-8750
February 26, 1976

Mr. Raymond L. Dobard
P. O. Box 3038
Berkeley, CA 94703

Dear Mr. Dobard:

Your letter of February 18, 1976 to the State Treasurer concerning payment of interest on condemnation case #345957, Parcel #0-R507, has been forwarded to this office.

On March 16, 1966 the San Francisco Bay Area Rapid Transit District deposited $77,000.00 in the State Treasury for this condemnation proceeding. On May 17, 1966 the entire $77,000.00 was withdrawn. The interest earned and paid on this deposit was $583.57.

Your letter refers to the amount of $79,500.00 which is the amount of another deposit. On September 15, 1966 a deposit of $79,500.00 was made into the State Treasury by the San Francisco Bay Area Rapid Transit District for case #345959 (Raymond L. Dobard). On October 9, 1970 a withdrawal of $20,988.29 was made; and on October 16, 1970 a withdrawal of $475.19 was made; leaving a balance of $58,036.52.

 EXHIBIT B-2

Section 1204(i) of the Code of Civil Procedure states in part that, "The State Controller shall apportion as of June 30 and December 31 of each year the interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund...." The attached schedule shows the interest earned and paid to the San Francisco Bay Area Rapid Transit District on this deposit in the State Condemnation Deposits Fund.

Very truly yours,

KENNETH CORY
STATE CONTROLLER

By

S. J. Cord, Chief
Division of
Accounting

-A 68-

GAB:hj
Encl.

ROGERS, VIZZARD & TALLETT
360 Pine Street
San Francisco, CA 94104

Filed Sept 2, 1966
Jack G. Blue, County Clerk
By: R. L. Hunter, Deputy

Attorneys for Plaintiff

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, a public body, corporate and politic, Plaintiff, vs. RAYMOND L. DOBARD, et al., Defendants.	No. 34957 Parcel No. 0-R507 ORDER FOR WITHDRAWAL OF JUDGMENT AWARD AND FOR DEPOSIT IN THE STATE TREASURY

It appearing that plaintiff has made

EXHIBIT C

payment into the above entitled court for the benefit of defendants of the full amount of the judgment on or before May 3, 1966; and

It appearing that the said court has duly and regularly made an order for possession by plaintiff on the subject property to be effective as of September 22, 1966; and

It appearing that pursuant to Section 1254 of the Code of Civil Procedure, the plaintiff requests the money heretofore paid into court to be withdrawn and deposited in the custody of the State Treasurer in the Condemnation Deposits Fund;

IT IS ORDERED that the full amount of the judgment paid into court by plaintiff pursuant to the judgment in the above entitled action is reasonably adequate to secure to the defendants claiming rights or interests in or to said parcel No. 0-R507, the probable just compensation for such taking and any damage incident

thereto;

IT IS FURTHER ORDERED that the plaintiff shall withdraw the sum of $79,500.00 heretofore paid into court as the full amount of the judgment, and thereafter deposit the said sum in the Condemnation Deposits Fund in the custody of the State Treasurer.

Dated: Sep -2 1966

Cecil Mosbacher
Judge of the Superior Court

ROGERS, VIZZARD & TALLETT
Attorneys at Law
360 Pine Street
San francisco, California

Attorneys for Plaintiff

FILED
1966:May 3 PH4:56
Jack G. Blue
County Clerk

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, a public body, corporate and politic, Plaintiff, vs. RAYMOND L. DOBARD and JEANNE R. DOBARD, his wife, et al., Defendants	No. 345,957 Parcel No. 0-R507 ORDER FOR RELEASE OF DEPOSIT

It appearing to the above-entitled Court that the property described as Parcel No. 0-R507 in these proceedings has been acquired by plaintiff through judgment on file herein, and that payment in full therefor has been deposited in court for the benefit of the

EXHIBIT B-1 -A 72-

defendants adjudged to be entitled thereto; and

IT FURTHER APPEARING that the total sum of $77,000 was deposited by plaintiff as security for the order of possession herein; and GOOD CAUSE APPEARING THEREFOR:

IT IS HEREBY ORDERED that said sum of $77,000 deposited by plaintiff with the State Treasurer in the condemnation deposit fund for the benefit of defendants sued in connection with said Parcel 0-R507 may be withdrawn, and the State Treasurer is directed to pay out said sum to SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, 814 Mission Street, San Francisco, California, directed to the attention of Mr. E. S. Clifford, Controller, as plaintiff's agent.

DATED: May 3 1966.

Cecil Mosbacher
Judge of the Superior Court

ROGERS, VIZZARD & TALLETT
360 Pine Street
San Francisco, California

Attorneys for Plaintiff

FILED 1966 May 3 PM 4:51
Jack G. Blue County Clerk
By: (Deputy)

Entry Date May 4 1965
Vol. 36 Page 38 (Brief)
Jack G. Blue, County Clerk
By: (Deputy)

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, A PUBLIC BODY, CORPORATE AND POLITIC,	No. 345,957 Parcel No. 0-R507
Plaintiff	FINAL ORDER OF CONDEMNATION
vs.	
RAYMOND L. DOBARD and JEANNE R. DOBARD, his wife, et al.,	
Defendants.	

The plaintiff in the above-entitled

EXHIBIT B

action, having paid into court for the benefit of defendants RAYMOND L. DOBARD, JEANNE R. DOBARD, ADAH TAYLOR, ALLYNE GRAFF BACHER, GEORGES COURTOIS, ROGER COURTOIS, GEORGES COURTOIS and COUNTY OF ALAMEDA, a body corporate and politic, the total amount of compensation awarded by the Court for the taking of property described as Parcel 0-R507 in the complaint on file herein, and for all claims and demands of said defendants against plaintiff by reason of the taking of said property for rapid transit purposes;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the hereinabove described parcel, incorporated herein by reference and attached hereto and described as Exhibit "A", be, and it is hereby, condemned to plaintiff in fee simple absolute, said property being situated in the County of Alameda, State of California.

IT IS FURTHER ORDERED that a copy of this Final Order of Condemnation be filed

in the office of the Recorder of the County in which said property is located, and thereupon the property hereinbefore described, and the title thereto, shall rest in plaintiff in fee simple absolute.

Dated: May 3, 1966

Cecil Mosbacher
Judge of the Superior Court

Rogers, Vizzard & Tallett
360 Pine Street
San Francisco, California 94104

FILED 1966 May -3 PM 4:51
Jack G. Blue, County Clerk
By: (Deputy)

Entry Date May 4 1965
Vol. 136 Page 38
Jack G. Blue, County Clerk
By: (Deputy)

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, a public body, corporate and politic,	No. 345,957
Plaintiff	Parcel No. 0-R507
vs.	JUDGMENT IN CONDEMNATION
RAYMOND L. DOBARD and JEANNE R. DOBARD, his wife, et al.,	
Defendants.	

EXHIBIT A

Upon the Findings of Fact and Conclusions of Law on file herein, and GOOD CAUSE APPEARING THEREFOR:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that upon payment into court for the benefit of defendants RAYMOND L. DOBARD, JEANNE R. DOBARD, ADAH TAYLOR, ALLYNE GRAFF BACHER, GEORGES COURTOIS, ROGER COURTOIS, GEORGES COURTOIS and COUNTY OF ALAMEDA, a body corporate and politic, as their respective interests shall be determined, of the total sum of $79,500, there shall be condemned to plaintiff in fee simple for rapid transit purposes all the real property and property interests described in plaintiff's complaint on file herein as Parcel 0-R507.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the sum of $15,873.23 herein referred to (which is the amount of the lien granted the plaintiff in Action No. 308,168, Adah Taylor vs. Raymond L. Dobard, et al., against any judgment in

favor of the defendants Raymond L. Dobard and Jeanne R. Dobard in Action No. 345,957 San Francisco Bay Area Transit District vs. Raymond L. Dobard, et al.) should be held in the custody of the Court until the final determination, disposition or dismissal of said action on appeal, and should then be disbursed in accordance with the further order of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any ad valorem taxes, penalties or costs due and owing local taxing and assessment agencies as of date of entry of Judgment be deducted from the judgment award, in accordance with Revenue and Taxation Code Section 4986, as amended.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the balance remaining less the hereinabove described apportionments and less any deductions herein provided for, shall be paid over to defendants RAYMOND L. DOBARD and JEANNE R. DOBARD.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the use for which said property is sought to be condemned, to wit, for rapid transit purposes, is and was a public use, and that the taking in condemnation of said property by plaintiff is and was necessary for said public use.

IT IS FURTHER ORDERED that said defendants do have and recover from plaintiff their costs of suit herein incurred.

Dated: May 3, 1966

Cecil Mosbacher

Judge of the Superior Court

Recd in Dept. 6
On Mar 31 1966
By R. L. Hunter
Deputy

Rogers, Vizzard & Tallett
Attorneys at Law
360 Pine Street
San Francisco, California

Attorneys for Plaintiff

FILED
Apr 15, 1966
Jack C. Blue,
County Clerk
By_____
Deputy

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAN FRANCISCO BAY AREA RAPID TRANSIT, a public body, corporate and politic,	No. 345,957 Parcel No. 0-R507
Plaintiff	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	
RAYMOND L. DOBARD and JEANNE R. DOBARD, his wife, et al.,	
Defendants	

This cause for the condemnation of certain real property situated in the County of Alameda, State of California, and more particularly described as

—A 81— **EXHIBIT D**

Parcel O-R507 in plaintiff's complaint on file herein, came on regularly for trial on the 14th day of March, 1966, before HONORABLE CECIL MOSBACHER, Judge of the Superior Court,

FINDINGS OF FACT

I.

That this action was regularly commenced in the County of Alameda on November 25, 1964, to condemn the real property described in the complaint as Parcel (-R507.

III.

That the use for which said property is sought to be condemned, to wit, for rapid transit purposes, is authorized by law and is and was of public use; and that the taking in condemnation of said

property by plaintiff is and was necessary to said public use.

IV.

That the real property and property interests described as Parcel 0-R507 is owned by RAYMOND L. DOBARD and JEANNE R. DOBARD, his wife.

VII.

That the fair market value of the real property described as Parcel 0-R507 in plaintiff's complaint on file herein, as of November 25, 1964, is the sum of SEVENTY-NINE THOUSAND FIVE HUNDRED DOLLARS ($79,500.00).

Upon the foregoing facts, the Court makes the following:

CONCLUSIONS OF LAW

I.

That plaintiff is entitled to a judgment in condemnation decreeing that upon payment into court for the benefit of defendants RAYMOND L. DOBARD, JEANNE R. DOBARD, ADAH TAYLOR, ALLYNE GRAFF BACHER, GEORGES COURTOIS, ROGER COURTOIS, GEORGES COURTOIS and COUNTY OF ALAMEDA, a body corporate and politic, as their respective interests shall be determined, of the total sum of SEVENTY_NINE THOUSAND FIVE HUNDRED DOLLARS ($79,500.00), there shall be condemned to plaintiff in fee simple for rapid transit purposes all the real property and property interests described in plaintiff's complaint on file herein as Parcel 0-R507.

VI.

That the payment into Court by plaintiff of the total sum of SEVENTY-NINE THOUSAND FIVE HUNDRED DOLLARS ($79,500) is in full payment for the real property and property interests so taken and for all damages of every kind and nature suffered or to be suffered by the aforesaid defendants by reason of the taking of Parcel 0-R507, and the construction and use of the public improvement in the manner proposed by plaintiff.

DATED: Apr 15 1966

Cecil Mosbacher
Judge of the Superior Court

PROOF OF MAILING - AFFIDAVIT

I, Raymond Dobard, appellant in pro se, hereby certify that, on the 10th day of April, 19 91, I deposited in a United States post office (or, mailbox) located at Berkeley, California, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, by "Express Mail" within the time allowed for filing, the foregoing. and also mailed by first class mail copies of PETITION FOR WRIT OF CERTIORARI to the following:

1. Law Office of Erickson, Beasley & Hewitt, 12 Geary St., S.F., 94109
2. Court of Appeal State of California, 350 McAllister St., S.F. 94102
3. Superior Court of California 1225 Fallon St., Oakland, CA 94612

Raymond Dobard

STATE OF CALIFORNIA
COUNTY OF Alameda

On this 10th day of April in the year one thousand nine hundred and Ninety One, before me, Luiz L. DeSouza, a Notary Public, State of California, personally appeared Raymond Dobard and ~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to be the person ~~whose name~~ who subscribed to this instrument, and acknowledged that ~~he~~ executed it.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the State of California County of Alameda on the date written above.

OFFICIAL SEAL
LUIZ LURDIANO DE SOUZA
NOTARY PUBLIC-CALIFORNIA
ALAMEDA COUNTY
My Commission Expires April 29, 1994

Notary Public, State of California

My commission expires April 29, 1994

CS-24 (6/82) – Acknowledgement – General (California Civil Code Section 1189)

(2)
90-1586

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

No. A-710

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

RAYMOND DOBARD,
Petitioner,

VS.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of California
First Appellate District
Division One

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the Court of Appeal of the State of California, First Appellate District, Division One, wrongfully concluded that petitioner's claims that in the mid-1960's respondents fraudulently took petitioner's air rights without just compensation and thereafter sold them to the City of Berkeley, unnecessarily condemned petitioner's property for no public purpose, and condemned petitioner's property to retaliate against petitioner for filing a taxpayer's suit against respondents were barred by res judicata?

2. Whether the Court of Appeal of the State of California, First Appellate District, Division One, wrongfully concluded that respondents did not convert interest earned on the condemnation award deposited in the State Treasury and did not violate petitioner's constitutional or other rights by their actions with respect to interest earned on the condemnation award deposited in the State Treasury?

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[1] Based upon a reading of petitioner's 23 "Questions Presented for Review", Petition for Writ of Certiorari, p. 1-12, it is difficult to perceive the bases upon which petitioner relies in seeking this Court's discretionary review. However, based on the decision of Court of Appeals of the State of California, First Appellate District, Division One, and petitioner's Second Amended Complaint, the issues appear to be as set forth herein.

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No. A-710

In the Supreme Court

OF THE

United States

October Term, 1990

Raymond Dobard,
Petitioner,

vs.

San Francisco Bay Area Rapid Transit District, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of California
First Appellate District
Division One

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

This Court may review the decision of the California Court of Appeal pursuant to 28 U.S.C.A. section 1257(a). In petitioner's jurisdictional statement, he incorrectly asserts that review of this case is authorized on the basis that the state court "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court." Petition for Writ of Certiorari ("Petition"), p. 16. Neither situation is present here.

STATEMENT OF THE CASE

In the mid-1960's, respondent Bay Area Rapid Transit District ("BART") initiated an eminent domain proceeding in state court to condemn real property belonging to petitioner, in order to

construct facilities needed for rapid transit purposes. On May 3, 1966, the trial court entered a Judgment in Condemnation and a Final Order of Condemnation, providing that, having paid the required amount of compensation into court (to wit, $79,500.00), BART was the owner in fee simple absolute of the property. *See* Order of Court of Appeal of the State of California, First Appellate District, Division One ("Order"; copy appended hereto), p. A-2.

On September 2, 1966, the trial court entered an Order for Withdrawal of the Judgment Award and for Deposit in the State Treasury. The order specified that the judgment award be withdrawn from the court and deposited in the Condemnation Deposits Fund of the California State Treasury. The judgment award was deposited in the Condemnation Deposits Fund and BART informed petitioner that the funds were available for his withdrawal pursuant to court order. Petitioner chose not to withdraw the award amount until October 1970, at which time he began to withdraw the principal at intervals. Because petitioner left the funds in the State Treasury, rather than withdraw them, interest accrued. Pursuant to California Government Code section 16429, that interest was eventually paid by the State Treasury to BART. *See* Order, p. A-2.

Twenty-two years later, on September 12, 1988, petitioner sued respondents, setting forth various causes of action based on the following basic factual allegations: that respondents had condemned petitioner's real property unnecessarily, without a valid public purpose, and in retaliation against him for having filed a taxpayer's suit against BART; that BART failed to compensate him for the air rights to his property and then sold the air rights to the City of Berkeley; and that BART had misled petitioner into believing that the interest earned on the judgment deposited with the State Treasury was payable to him and converted the interest earned on the condemnation deposit to its own use. After affording petitioner two opportunities to amend his complaint to state a valid cause of action against respondents, the trial court sustained respondents' demurrer to petitioner's Second Amended Complaint without leave to amend. *See*, Order, p. A-3.

At petitioner's request, on February 16, 1989, the trial court filed a detailed Statement of Decision explaining that each of the causes of action alleged in the Second Amended Complaint failed to state a cause of action for one or more of the following reasons: (1) BART was entitled to the interest earned on the condemnation deposit, pursuant to California Government Code section 16429; (2) attacks on the propriety of the condemnation proceedings was barred by res judicata; and (3) petitioner's causes of action were barred by the statute of limitations. Petitioner filed a motion for reconsideration on February 21, 1989, which was denied by the trial court on April 6, 1989. *See*, Order, p. A-3.

Petitioner filed a notice of appeal with the Court of Appeal of the State of California, First Appellate District, Division One ("the California Court of Appeal" or "the state appellate court") on March 10, 1989. By Order filed September 26, 1990, the California Court of Appeal affirmed the trial court's judgment dismissing petitioner's Second Amended Complaint, stating:

> to the extent that each cause of action was based on the allegation that BART converted the interest on the judgment deposited in the state treasury, the demurrer as to each cause of action was properly sustained because BART was entitled to the interest on the judgment award. Moreover, to the extent that any cause of action was based on a challenge to the condemnation proceedings, that cause of action is barred by res judicata.

Order, p. A-4. Petitioner now seeks review by this Court of the decision of the California Court of Appeal. By Order filed December 12, 1990, the California Supreme Court denied petitioner's petition for review of the Court of Appeal's decision.

SUMMARY OF ARGUMENT

There are no special or important reasons justifying this Court's review of the state appellate court decision at issue herein. The state appellate court did not decide any important question of federal law, which might justify granting review of its decision. *See* Sup. Ct. R. 10.

Although petitioner claims that federal constitutional issues are involved, specifically the "taking clause" of the Fifth Amendment, applicable to the states under the Fourteenth Amendment, that claim is without merit. The interest monies which petitioner claims were wrongfully withheld from him were interest monies that accrued *post*-judgment, on funds which were available to petitioner but which he chose not to withdraw.[2] They did not represent part of the value of petitioner's real property which was the subject matter of the 1966 condemnation proceeding. Those interest monies were payable to respondents under valid state law and petitioner did not have any property interest in those monies. Therefore, respondent BART's receipt of those funds did not constitute a "taking."

The state appellate court's decision that petitioner's claims were barred by res judicata is based on valid state law. The condemnation proceeding at issue occurred in the mid-1960's. The 1966 Judgment was a final determination of BART's right to condemn petitioner's real property and the amount of just compensation to which petitioner was entitled. Additionally, petitioner's 1988 attack on that judgment was barred by the applicable statute of limitations, as the trial court ruled in sustaining BART's demurrer. No federal statutory or constitutional rights are implicated by those rulings of the state appellate and trial courts.

---

[2] Petitioner also claims that BART wrongfully received $583.57 in interest accrued between March 16, 1966 to May 17, 1966. Petition, p. 6. That issue was not raised by petitioner in his Second Amended Complaint and therefore was not addressed by the trial court or the state appellate court and is not properly a subject for review by this Court. Even if it were, such interest monies are not part of the just compensation to which petitioner would be entitled, because BART did not "take" petitioner's property until after it was awarded possession of the property in May 1966.

REASONS FOR DENYING THE WRIT

I

THE INTEREST MONIES WHICH RESPONDENT BART RECEIVED WERE MONIES IN WHICH PETITIONER HAD NO PROPERTY INTEREST AND THEREFORE NO "TAKING" OCCURRED

The state appellate court correctly held that respondent BART, not petitioner, was entitled to the interest on the judgment award. Upon paying the amount which the trial court determined, in 1966, constituted "just compensation" for petitioner's property, BART became the owner of the property and took possession of that property. That full judgment amount was deposited with the State Treasury and made available to petitioner for withdrawal by him. Interest which accrued on that sum of money after it was made available to petitioner is not part of the "just compensation" ordered by the court or to which petitioner might be otherwise entitled.

What is *not* at issue here is interest to which a condemnee may be entitled due to a delay between the date the condemnor takes the condemnee's property and the date the condemnor pays compensation to the condemnee. Where such a delay occurs, the condemnee is constitutionally entitled to interest on the judgment award for the period of the delay, as part of the compensation for the taking. *See, e.g., Albrecht v. United States*, 329 U.S. 599, 602 (1947) ("just compensation" equals fair market value at time of taking plus interest from date of taking to date of payment); *United States v. Creek Nation*, 295 U.S. 103, 111 (1935) (where payment of just compensation delayed for many years after taking, payment should include interest from date of taking). In such situations, interest is awarded in order "to produce the present full equivalent of that value paid contemporaneously with the taking." *U.S. v. Creek Nation*, 295 U.S. at 111.

Here, BART did not "take" petitioner's property until *after* it paid into court the amount of just compensation to which the fact-finder determined petitioner was entitled, so there was no delay between taking of the property and payment of just compensation. The interest monies at issue in the instant case are

monies which accrued post-judgment, after the just compensation to which petitioner was entitled had been awarded and paid into the State Treasury for withdrawal by petitioner. Thus, what petitioner is seeking is not interest which represents a portion of the value of his real property, but interest which accrued on *money* which BART made available to him but which he chose not to collect.

The state appellate court correctly found that petitioner did not and could not state a cause of action based on a right to interest on the judgment award, because the interest did not belong to him. As the state appellate court stated, quoting the trial court:

> "under Code of Civil Procedure section 1268.320(b)[3] and its predecessor, former section 1255b(c),[4] interest ceased to accrue on the date the judgment funds, including interest accrued to that date, were deposited by BART in court, i.e., on May 3, 1966. Therefore, [Dobard] has not been entitled to any interest on the judgment award at any time since BART deposited the funds in court."

Order, p. A-4 to A-5.

The interest which was paid to BART, rather than to petitioner, was interest which is earned and paid out to a plaintiff pursuant to specific statutory authority. California Government Code section 16429, subdivisions (b) and (c), provides as follows:

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[3] Section 1268.320 provides in pertinent part: "The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates: . . . (b) As to the amount deposited in accordance with Article 2 . . . the date of such deposit."

[4] Former section 1255b, subdivision (c), which was in effect at the time judgment was entered in 1966 in this case, provided in relevant part: "The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates: . . . (4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment." (Stats. 1961, ch. 1614, § 10, p. 3451.)

> (b) Money in the Condemnation Deposits Fund shall be invested under the provisions of Article 4 (commencing with Section 16470) of Chapter 3.
>
> (c) The State Controller shall apportion as of June 30th and December 31st of each year the interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. *There shall be apportioned and paid to each plaintiff having a deposit in the fund* during the six-month period for which an apportionment is made *an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein*, except that no payment shall be made of any interest in the amount of five dollars ($5) or less. Such amounts shall be transferred to the General Fund by the State Controller. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or judge thereof may, by order or decree, direct. Any residual amount after all required payments have been made shall be paid to the plaintiff if such amount is more than five dollars ($5). If the amount is five dollars ($5) or less, it shall be transferred to the General Fund by the State Controller. (emphasis added)

Because the plaintiff in an eminent domain action is the person seeking to take the property, Code Civ. Proc. § 1250.210, the "plaintiff" referred to in the above statute is the condemnor. The statute clearly requires the payment of interest to the condemnor, not to the condemnee.[5] Petitioner, the condemnee, was not entitled to the interest he is claiming. As the state appellate court found, "BART was acting in accordance with the law when it accepted payments of the interest on the deposit." Order, p. A-5.

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[5] Government Code section 16429, subdivision (c) is a reenactment of former Code of Civil Procedure section 1254, subdivision (i). Law Rev. Comm. comm. to Gov. Code, § 16429. Former Code of Civil Procedure section 1254 was in effect at the time BART deposited the judgment award in the Condemnation Deposits Fund. Thus, at all times relevant to this case, state law required that payment of interest on such deposited funds be paid to the condemnor.

The state appellate court correctly affirmed the decision sustaining the demurrer on the grounds that "BART, as a matter of law, was entitled to the interest earned." Order, p. A-6.

II

THE STATE APPELLATE COURT'S APPLICATION OF THE DOCTRINE OF RES JUDICATA WAS PROPER AND DOES NOT RAISE FEDERAL OR CONSTITUTIONAL ISSUES

The appellate court correctly held that petitioner's allegations that BART condemned his "air rights" without appraising those rights or providing just compensation for them, sold those rights to the City of Berkeley without his permission, condemned his property without a public purpose, and condemned his property in retaliation for his having filed a taxpayer's suit against BART were all attacks on the 1966 judgment in condemnation and were barred by the doctrine of res judicata.

The doctrine of res judicata is part of the common law of California and is also reflected in state statutes. *See, e.g., Salter v. Blackwood*, 15 Cal.3d 791, 543 P.2d 593, 126 Cal.Rptr. 225 (1975); Cal. Code Civ. Proc. § 1908. The doctrine "gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." 7 B. Witkin, *California Procedure* (3d ed. 1985), Judgment § 188, p. 621 (emphasis in original). Petitioner could not state a new cause of action by attacking a condemnation judgment that had been final for 22 years. Witkin, *supra*, Judgment § 261, p. 702 ("If a title or interest in property was in issue in a former action, the judgment is conclusive in later proceedings involving the same title or interest. [citations omitted]").

Therefore, the state appellate court correctly concluded that petitioner's allegations regarding actions taken by BART in the mid-1960's eminent domain action—including his claim that he was entitled to prejudgment interest beginning on November 25, 1964 when the complaint was filed—were barred. As it stated,

> All of the claims we have described with respect to condemnation of air rights, condemnation without a proper public purpose, and condemnation for retaliation, could have been raised as objections to the right of BART to take appellant's property. (Code Civ. Proc., §§ 1250.360, 1250.370.) Thus, they clearly involve the "same controversy." The trial court correctly concluded that: "The Judgment in Condemnation and Final order of Condemnation gave BART ownership of the entire fee including the air rights. (Civ. Code, § 829.) Furthermore, the judgment was a final determination of BART's right to condemn the property and the amount of just compensation for the fee simple absolute including the air rights."

Order, A-7.

In determining that petitioner's claims were barred by res judicata, the state appellate court interpreted California's procedural and substantive rules. No federal constitutional, statutory, or common law was implicated by that decision. Moreover, federal law recognizes the importance of affording res judicata effects to decisions of state courts, both in the full faith and credit clause of the Constitution, Art. IV, § 1, and in the federal full faith and credit statute, 28 U.S.C.A. § 1738. Thus, not only is no federal question implicated by the state court decision at issue here, but federal law supports the state appellate court's decision giving res judicata effect to the 1966 judgment in condemnation.

III

THE STATE TRIAL COURT PROPERLY DECIDED THAT PETITIONER'S ALLEGATIONS WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The state trial court sustained BART's demurrer on the additional ground that petitioner's claims that BART "fraudulently" took his "air rights" and "unnecessarily" condemned his business were barred by the applicable statute of limitations. If these allegations were construed as an attempt to plead a cause of action for inverse condemnation, the applicable statute of limitations would be either three years or five years. *Mehl v. People ex*

rel. Department of Public Works, 13 Cal.3d 710, 717, 532 P.2d 489, 119 Cal.Rptr. 625 (1975). Whichever statute applied, the period began to run when the "damage [was] sufficiently appreciable to a reasonable man." (*Id.* at 717.)

Petitioner alleged in his Second Amended Complaint that the taking began on October 20, 1964. Therefore, the statute of limitations began running on that date and expired in either 1967 or 1969. Regardless of which statute applied, the "taking" allegations raised in petitioner's 1988 complaint were clearly barred. With respect to his air rights, petitioner knew or should have known that the air rights were included in the valuation of his fee, because California Civil Code section 829 has long provided that a fee interest includes the surface of land and everything below and above it. The valuation issue was settled by the Judgment in Condemnation entered on May 3, 1966, and the statute of limitations bars any attack on that judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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Keith Bernard, Ernest Howard,
and Michael Sharpe

May 1991

Appendix A

In the Court of Appeal of the State of California

First Apppellate District

Division One

Raymond Dobard,
Plaintiff and Appellant,

v.

San Francisco Bay Area Rapid Transit District et al.,
Defendants and Respondents.

A045389

(Alameda County Super. Ct. No. 642762-5)

[Filed Sept. 28, 1990]

Raymond Dobard, appearing in propria persona, appeals from an order sustaining a demurrer to his second amended complaint against San Francisco Bay Area Rapid Transit District (BART), Keith Bernard, Michael Sharpe, Ernest Howard, and Gray Davis.[1] We will affirm the judgment.

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[1] An order sustaining a demurrer without leave to amend is not an appealable order. (*Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1254.) The superior court did, however, subsequently file a statement of decision in which it clearly stated the multiple reasons why Dobard could not state a cause of action. Although the statement of decision does not technically qualify as a judgment, it is obvious that the court intended by its order to enter judgment dismissing all causes of action. Thus to avoid any further delay, this court exercises its power to amend the order to include a judgment of dismissal of the second complaint. (*Randle v. City and County of San Francisco* (1986) 186 Cal.App.3d 449, 453-454.)

FACTS

Approximately 20 years ago, BART initiated eminent domain proceedings against certain real property owned by Dobard.[2] On May 3, 1966, a judgment in condemnation and a final order of condemnation were entered. The judgment in condemnation provided that upon BART's payment into court of the amount of $79,500, BART would become the owner of the real property described in the judgment. The payment of $79,500 was for the benefit of Raymond Dobard, his wife Jeanne Dobard, Adah Taylor, Allyne Graff Bacher, Georges Courtois, Roger Courtois and the County of Alameda. The judgment in condemnation further provided that the sum of $15,873.23, the amount of a lien granted to Adah Taylor in a separate action against Dobard and his wife, should be held in the custody of the court until the final disposition of the appeal in that separate matter. Any amount remaining after the payment of amounts owed on a promissory note and taxes was to be paid to Dobard and his wife. The final order of condemnation stated that BART, having paid the amount of $79,500 into court, was the owner in fee simple absolute of the property. On September 2, 1966, the court entered an order for withdrawal of the judgment award and for deposit in the state treasury. The judgment award was thereupon deposited in the state treasury.

Dobard did not withdraw the principal for many years. The entire principal remained on deposit until October 1970. Thereafter principal was withdrawn at intervals, leaving the principal amount of $2,036.52 as of November 1981. The total interest

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[2] These facts are derived from Dobard's pleadings and the voluminous exhibits thereto, and from court records judicially noticed by the court below. Although a demurrer normally is limited to the face of the pleading, the court may also consider any matter judicially noticed. (Code Civ. Proc., § 430.30, subd. (a); *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 997.) The court may also read the complaint as if it included facts set forth in exhibits to the complaint. (4 Witkin, Cal. Procedure (3d ed. 1985) § 385, pp. 433-434.) Moreover, if the allegations of the complaint conflict with recitals set forth in exhibits to the complaint, the exhibit will control. (*Id.*, citing *Alphonzo E. Bell Corp. v. Bell etc. Synd.* (1941) 46 Cal.App.2d 684, 691.)

accrued from the date of the initial deposit was $60,058.27, and as of 1988 that amount had been paid to BART pursuant to Government Code section 16429.

On September 12, 1988, Dobard filed a complaint against BART. After the court sustained two demurrers with leave to amend, Dobard filed a second amended complaint. The underlying wrongs alleged in the second amended complaint were substantially similar to the original complaint. With respect to each cause of action, Dobard alleged that BART had condemned his real property unnecessarily, without a valid public purpose, and in retaliation against him for having filed a taxpayer's suit against BART; that BART failed to compensate him for the air rights to his property and then sold the air rights to the City of Berkeley; and that BART had misled Dobard into believing that the interest earned on the deposit was payable to him and converted the interest earned on the condemnation deposit to its own use. These basic factual allegations were then incorporated into the following causes of action: Continuing conspiracy to interfere with civil rights, fraudulently taking air rights without compensation, breach of fiduciary duty, intentional infliction of emotional distress, breach of public policy, and denial of due process.

The court sustained the demurrer to the second amended complaint without leave to amend. At Dobard's request the court, on February 16, 1989, filed a detailed statement of decision explaining that each of the causes of action alleged in the second amended complaint failed to state a cause of action for one or a combination of the following reasons: (1) Pursuant to Government Code section 16429, BART was entitled to the interest earned on the condemnation deposit; (2) any attack on the propriety of the condemnation proceedings was barred by res judicata; and (3) Dobard's causes of action were barred by the statute of limitations. Dobard filed a motion for reconsideration on February 21, 1989, and the court denied that motion on April 6, 1989. Dobard filed his notice of appeal on March 10, 1989.

ANALYSIS

It would be impossible to respond to each of the arguments in appellant's brief without substantially confusing the issues on appeal. We therefore confine our analysis to the allegations of the second amended complaint and whether the court correctly sustained the demurrer to each cause of action. Each cause of action was based on the same underlying allegations that (1) BART converted interest earned on the condemnation award that should have been invested for Dobard's benefit; and (2) BART fraudulently took appellant's air rights without just compensation and thereafter sold them to the City of Berkeley, unnecessarily condemned his property for no public purpose, and condemned appellant's property to retaliate against appellant for filng a taxpayer's suit against BART. As we shall explain below, to the extent that each cause of action was based on the allegation that BART converted the interest in the judgment deposited in the state treasury, the demurrer as to each cause of action was properly sustained because BART was entitled to the interest on the judgment award. Moreover, to the extent that any cause of action was based on a challenge to the condemnation proceedings, that cause of action is barred by re judicata.

1. BART Was Legally Entitled to Accept Payments of Interest on the Deposit.

As the trial court explained, "under Civil Procedure section 1268.320(b)[3] and its predessor, former section 1255b(c),[4] interest ceased to accrue on the date the judgment funds, including

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[3] Section 1268.320 provides in pertinent part: "The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates: . . . (b) As to the amount deposited in accordance with Article 2 . . . the date of such deposit."

[4] Former section 1255b, subdivision (c), which was in effect at the time judgment was entered in 1966 in this case, provided in relevant part: "The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates: . . . (4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the

interest accrued to that date, were deposited by BART in court, i.e., on May 3, 1966. Therefore, [Dobard] has not been entitled to any interest on the judgment at any time since BART deposited the funds in court."

Moreover, pursuant to Government Code section 16429, subdivision (c), the interest on any deposit in the Condemnation Deposits Fund is payable to the "plaintiff," i.e., the condemnor.[5] Thus, as a matter of law, BART was acting in accordance with the law when it accepted payments of the interest on the deposit.

Appellant's mistaken belief that he was wrongfully deprived of interest on the award is based on an apparent misunderstanding of the law and facts. He attaches great importance to a letter he received in 1976 in which a BART official responded to his request for an accounting of interest. The letter explained that, as Dobard apparently was aware, the funds were available for withdrawal at anytime. The last paragraph, in response to Dobard's demand for the interest, stated that if Dobard obtained a court order requiring that BART pay to Dobard the interest it had been paid, BART would comply. Dobard interprets this letter as an attempt to mislead him into believing that BART would pay the interest to him, and to conceal from him the fact that BART was entitled to the interest so long as the deposit remained in the state treasury. The letter, however, is not reasonably susceptible of such a construction. It does no more than state the obvious fact that if Dobard could persuade a judge that he was entitled to the interest, BART would comply with the court's order. The court was entitled to rely on the document attached as an exhibit to the complaint, rather than the general allegations of fraud. (4 Witkin, Cal. Procedure, *supra*, § 385, pp. 433-434; citing *Alphonzo E. Bell Corp. v. Bell etc. Synd., supra*, 46 Cal.App.2d 684.)

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defendant after entry of judgment, the date of such payment." (Stats. 1961, ch. 1614, § 10, p. 3451.)

[5] Government Code section 16429, subdivision (c) is a reenactment of former Code of Civil Procedure section 1254, subdivision (i), which was in effect at the time BART deposited the funds in 1966. (Law Rev. Comm. com. to Gov. Code, § 16429.)

Dobard also contends that BART failed to comply with the procedures applicable to eminent domain in "taking" the interest. Assuming arguendo that these procedures apply to the taking of personal property, BART was entitled to the interest and thus no "taking" occurred.

Dobard further argues that Code of Civil Procedure section 1268.150, subdivision (b), required that BART "deposit and invest appellant's judgment award . . . for the benefit of appellant." Section 1268.150, however, applies only if "after entry of judgment but prior to apportionment of the award the defendants are unable to agree as to the withdrawal of all or a portion of any amount deposited," and one of the defendants files a motion requesting investment of the funds for the benefit of the defendants pending resolution of the dispute. (Code Civ. Proc., § 1268.150, subd. (b).) Dobard does not allege either that a dispute over apportionment occurred or that he, or any other defendant in the eminent domain proceeding, filed such a motion. Thus, section 1268.150 is clearly inapplicable.

We therefore conclude that to the extent each cause of action was based on allegations that BART had converted or wrongfully deprived appellant of interest on the condemnation deposit, the court properly sustained the demurrer because BART, as a matter of law, was entitled to the interest earned.

2. Any Attack on the Prior Judgment in Condemnation Was Barred By Res Judicata

The remaining allegations of the complaint, incorporated into each cause of action, were that BART condemned his "air rights" without appraising them or providing just compensation, sold them to the City of Berkeley without his permission, condemned his property without a public purpose, and condemned his property in retaliation for his having filed a taxpayer's lawsuit against BART. These allegations amount to an attack on the 1966 judgment in condemnation and are barred by the doctrine of res judicata.

It is elementary that "[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy. It seeks to curtail

multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration* . . . ." (7 Witkin, Cal. Procedure (3d ed 1985) Judgment § 188, p. 621; italics in original.)

"The doctrine of res judicata is a part of the common law of this state (*Slater v. Blackwood* (1975) 15 Cal.3d 791 [126 Cal.Rptr. 225, 543 P.2d 593]) and also is reflected in such statutes as Code of Civil Procedure section 1908.

"Restatement Second Judgments views the doctrine as a bar or merger applicable to subsequent litigation between the same parties concerning the same controversy with very few exceptions. The Restatement's approach is based on the assumption that there has been an opportunity in the first litigation for a fair and full hearing of the claim asserted. Once that opportunity has been afforded, the Restatement Second asserts, fairness dictates that the controversy in question be put to rest." (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67-68.)

All of the claims we have described with respect to condemnation of air rights, condemnation without a proper public purpose, and condemnation for retaliation, could have been raised as objections to the right of BART to take appellant's property. (Code Civ. Proc., §§ 1250.360, 1250.370.) Thus, they clearly involve the "same controversy." The trial court correctly concluded that: "The Judgment in Condemnation and Final order of Condemnation gave BART ownership of the entire fee including the air rights. (Civ. Code, § 829.) Furthermore, the judgment was a final determination of BART's right to condemn the property and the amount of just compensation for the fee simple absolute including the air rights."

Appellant argues that, somehow, the allegation that BART concealed its plan to sell the air rights preserves this claim, despite the fact that, in substance, it is nothing more than an attempt to collaterally attack the finality of the 1966 judgment. Even if BART did "conceal" its plan to sell the air rights to the City of Berkeley, this fact would not state a cause of action. BART as the condemnor had no duty to explain to Dobard, an adverse party, that the condemnation included the air rights. Nor

did BART have any duty to disclose any plans it may have had to sell those rights. Pursuant to Code of Civil Procedure section 1240.120, subdivision (b), condemnors may acquire property "with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein. . . ." Thus, even if we accept as true Dobard's allegation that BART did not disclose its plan to sell the air rights to the City of Berkeley during the eminent domain proceedings, that fact fails to state a cause of action.

We therefore conclude that to the extent that each cause of action was based on allegations that BART failed to compensate Dobard for the air rights; or that it condemned his property unnecessarily and without a public purpose, and in retaliation for filing a taxpayer's lawsuit; the demurrer was correctly sustained on the ground that the cause of action was barred by res judicata.

CONCLUSION

The judgment is affirmed.

Stein, J.

WE CONCUR:

Racanelli, P.J.

Newsom, J.